

No. 14534

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**United States  
Court of Appeals**  
for the Ninth Circuit.

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TONY BORDENELLI and EYVOHN BORDE-  
NELLI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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**Transcript of Record**

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**Appeal from the District Court  
for the District of Alaska,  
Third Division**

**FILED**

**MAY -2 1955**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## ATTORNEYS OF RECORD

WILLIAM T. PLUMMER,  
United States Attorney,  
Anchorage, Alaska,  
Attorney for Plaintiff.

T. STANTON WILSON,  
P. O. Box 1753,  
Anchorage, Alaska,  
Attorney for Defendants.





Application for Liquor License in the Territory  
of Alaska, Third Division

License No. . . . . Application No. 4004

1. We, Tony and Eyvohn Bordenelli, the undersigned, doing business as Rainbow Cafe Annex, hereby apply for a dispensary liquor license for the year ending December 31, 1954, and tender herewith the sum of \$500.00 plus a filing fee of \$18.00.

2. Name and address and how long a resident of Territory of Alaska?

Name: Tony and Eyvohn Bordenelli.

Address: Kenai, Alaska.

How long a resident: 7 years.

3. Is this a first application, or for a renewal?:  
Renewal.

Type of License

Beverage Dispensary

Population less than 1,500 . . . . . \$500.00  
\* \* \*

(Minimum residence 1 year.)  
\* \* \*

5. Location of business to be conducted under license applied for: Rainbow Cafe Annex, Kenai, Alaska.

6. Distance by any public thoroughfare, street or alley, from any school ground or church?: 1,500 feet, school; 950 feet, church. (If within 200 feet, and not a renewal, attach plat showing exact location.)

7. Have you any other kind of liquor license? If so, state its kind and where used: No.

8. Endorsements as to character and integrity of applicant, and desirability of issuing license applied for. (Five Endorsers Must Sign Personally Below.)

Louis Nissen, Box 12, Kenai, retired, 40 years residence in Territory.

Mary Nissen, Box 12, Kenai, housewife, 43 years residence in Territory.

Nick Kalifoncz, Box 12, Kenai, retired, 69 years residence in Territory.

George Miller, Gen. Del., Kenai, fisherman, 34 years residence in Territory.

Venue Morey, Box 11, Kenai, business, 8 years residence in Territory.

9. Are you a citizen of the United States? If so, born or naturalized? Yes—Born.

10. If a corporation, are you qualified to do business in the Territory? .....

11. For Use Outside of Incorporated Towns: I have attached hereto a complete written list, alphabetically arranged, of all citizens of the United States over the age of 21 years residing within a radius of one mile of the place for which the license is desired, stating the actual place of residence of each, by street and number where possible, and the length of such residence thereat, verified by oath by the person taking the actual census and that said

census was taken within six weeks prior to the date of this application. I have also attached hereto a petition containing the names of a two-thirds majority of all citizens over the age of 21 years residing within one mile (radius) of the place where liquor is to be sold, bartered, manufactured, etc.

12. Applicant Declares: If application is for Retail or Dispensary license, if an individual or association, that he has resided in Alaska for at least one year prior to the date of this application;

If a corporation, that it is qualified to do business in Alaska;

If application is for a Beverage Dispensary or Retail Liquor license, that no corporation, wholesaler, owner, officer or representative of any brewery, winery, bottling works or distillery owns any interest in such business or has financed directly or indirectly the applicant in procuring quarters or supplying equipment or furnishings in order to conduct such business;

That no person or persons other than the applicant has any direct or indirect financial interest in the business for which this license is sought; that he or she will superintend in person, the management of the business and if any other person is employed to manage the same, that he or she will have the qualifications of an applicant and that applicant will be responsible for the proper conduct of the business;

That the building in which liquor is to be sold is 200 feet or more from any school ground or church, or, if the license is a renewal that it is for a building in which the sale of intoxicating liquor was authorized by law on March 23, 1949;

If a retail Liquor license is applied for, that the premises are not connected by doors or otherwise with premises upon which any other business is conducted;

If application is for a Club license, that applicant has been incorporated under Territorial or National charter for two years or more.

/s/ EYVOHN BORDENELLI,

/s/ TONY BORDENELLI.

United States of America,  
Territory of Alaska—ss.

Tony Bordenelli, being first duly sworn on oath, deposes and says: I have read the foregoing application on the face and back hereof and the same is true in all respects.

/s/ TONY BORDENELLI,

/s/ EYVOHN BORDENELLI.

Subscribed and sworn to before me this 7th day of December, 1953.

[Seal]     /s/ BETTY ROSS,  
Notary.

My commission expires 7/18/56.

In the District Court for the Territory of Alaska  
Third Division at .....

In the Matter of the Application of

.....

For an Intoxicating Liquor License

### ORDER

Upon consideration of the facts set forth and the statements made by the applicant in the foregoing application, and all or any facts adduced in relation thereto, and the Court being fully advised in the premises, the Court finds that the applicant is entitled to the license applied for, and It Is Hereby Ordered that the Clerk of the Court shall issue the same.

Dated at Anchorage, Alaska, this 31st day of December, 1953.

/s/ JOHN L. McCARREY, JR.,  
District Judge.

### Instructions

1. Each individual of a partnership must sign and swear to the application.

2. Applications for liquor licenses outside of incorporated towns, together with census and consent petition, must be filed with the Clerk of Court three weeks before order for issuance of license will be signed.

3. The census must conform in every detail as outlined in item eleven.

4. Application must be sworn to before Notary Public, United States Commissioner or Postmaster.

Must Be Completed and Signed by Applicants  
Outside of Incorporated Towns Only

Kenai, Alaska,

Dec. 7, 1953.

We, Tony and Eyvohn Bordenelli, the applicants on the foregoing application for a dispensary liquor license, do hereby certify that the number of citizens over the age of twenty-one years that reside within a one-mile radius of my place of business are 252 in number; that the number of bona fide and qualified citizens that have signed the petition that accompanies my application are 181.

/s/ EYVOHN BORDENELLI,

/s/ TONY BORDENELLI,

Applicants.

Note: Section 12. Penalties. A violation of any of the provisions of this Act shall be deemed a misdemeanor, and upon conviction thereof shall be punished by imprisonment of not more than one year, or by a fine of not more than Five Hundred Dollars (\$500), each violation to be considered a separate offense. Any intoxicating liquors shipped into the Territory, other than to licensees hereunder



and contrary to the provisions of this Act, shall be deemed contraband, and subject to confiscation by the Territory, or any enforcement officer, and any intoxicating liquors so seized shall be sold under the order of the District Court, and the proceeds thereof deposited with the Territorial Treasurer.

That any false material statement made in any part of this application shall be deemed perjury and upon conviction thereof shall be subject to the penalty provided by law for the crime of perjury.

[Endorsed]: Filed December 7, 1953.

Entered December 31, 1953.

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Certificate of Applicant

I, Eyvohn Bordenelli, the applicant of the attached liquor application, do hereby certify that the building in which liquor is to be sold is 1,500 [school ground] 950 [church] feet by the shortest direct line from a school ground or church.

Signed:

/s/ EYVOHN BORDENELLI,  
Applicant.

[Endorsed]: Filed December 7, 1953.

## Certificate of Applicant

I, Tony Bordenelli, the applicant of the attached liquor application, do hereby certify that the building in which liquor is to be sold is 1,500 [school ground] 950 [church] feet by the shortest direct line from a school ground or church.

Signed:

/s/ TONY BORDENELLI,  
Applicant.

[Endorsed]: Filed December 7, 1953.

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In the District Court for the Territory of Alaska,  
Third Division

In the Matter of:

The Application of TONY and EYVOHN BORDENELLI, Kenai, Alaska, Doing Business as RAINBOW CAFE ANNEX, for a Beverage Dispensary Liquor License

## PETITION

We, the undersigned, citizens of the United States and bona fide residents of the Territory of Alaska, over the age of twenty-one years, residing within the one (1) mile area of Rainbow Cafe Annex, and having been physically present, living, and residing within the one-mile area for more than six out of the twelve months immediately preceding the filing of this Petition, and in good faith, consent to, and ask that a liquor license (dispensary) be issued to



Tony and Eyvohn Bordenelli, doing business as Rainbow Cafe Annex, for such sale of intoxicating liquor in the voting and recording precinct in which the aforesaid described premises are located for the year ending December 31, 1954.

[Here follow the 187 signatures, addresses and length of residence.]

[Endorsed]: Filed December 7, 1953.

---

AFFIDAVIT

November 20, 1953.

I, Betty Ross, being first duly sworn, say: That the following is a full and complete census of all citizens over the age of 21 years, residing within a one-mile radius of Rainbow Cocktail Lounge during the preceding six months; and that it was taken within the last two weeks.

/s/ BETTY ROSS.

Subscribed and Sworn to before me this 20th day of November, 1953.

[Seal]     /s/ ELINOR ELDRIDGE,  
Notary Public,  
Residing in Kenai.

My commission expires 6-8-57.

[Here follow the 187 typed names of citizens who signed the foregoing petition.]

[Endorsed]: Filed December 7, 1953.

## AFFIDAVIT

United States of America,  
Territory of Alaska—ss.

Tony Bordenelli, being first duly sworn on oath,  
deposes and says:

That he makes this affidavit for and on his own  
behalf and for and on behalf of Eyvohn Bordenelli;

That neither he nor Eyvohn Bordenelli have vio-  
lated any of the Territorial Liquor Laws of the  
Territory of Alaska, and have not been convicted  
of any such violation.

/s/ TONY BORDENELLI.

Signed, sealed and executed in the presence of:

/s/ T. STANTON WILSON,

/s/ FLORENCE SESSOMS.

Subscribed and sworn to before me this 29th day  
of December, 1953.

[Seal]      /s/ FLORENCE SESSOMS,  
Notary Public in and for  
Alaska.

My commission expires 5-21-57.

[Endorsed]: Filed December 29, 1953.

[Title of District Court and Cause.]

HEARING ON APPLICATION FOR BEVER-  
AGE DISPENSARY LIQUOR LICENSE  
TO EXPIRE DECEMBER 31, 1954

Now at this time hearing on application for beverage dispensary liquor license to expire December 31, 1954, came on regularly before the Court in cause No. L. B. & W. 4004, entitled In the Matter of the Application of Tony and Eyvohn Bordenelli at Kenai for a beverage dispensary liquor license. Applicant present and with T. Stanton Wilson, their counsel. No protestants let their presence be known to the Court.

Anthony Bordenelli, being first duly sworn, testified for and in behalf of the applicants.

Counsel for applicants directed to submit brief on the matter.

Decision Reserved.

Entered December 29, 1953.

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[Title of District Court and Cause.]

BRIEF OF APPLICANTS, TONY BORDE-  
NELLI AND EYVOHN BORDENELLI

History of Matter

The question as to whether a reissue or renewal of a Liquor License granted to the above-entitled

applicants is legal under the existing Territorial Laws grows out of the following facts:

The original application, petition and census, requesting a Liquor License, was filed March 13, 1953, and as a result of a Hearing had before the late Judge Dimond, the applicants were granted permission by the Court to file a new petition and census. However, before the Order had been signed Judge Dimond had passed away and Judge George Folta signed the order. The applicants prepared a new census and filed a new petition and did so under the existing law which permitted an applicant who was beyond 200 feet from a church or school to apply for a Liquor License. The petition and census herein referred to was filed on the 20th day of June, 1953. It was done by special permission of the Court, and in accordance with the Order signed on the 16th day of June, 1953, by Judge Folta. It might be pointed out here that an amendment was added to the Territorial Liquor Laws which changed the allowed distance an applicant could be from a church or school, and changed the required number of signers on a petition. That law did not become effective until June 30, 1953, and the applicants could not have filed under those regulations until that time. After the necessary three weeks' waiting time had elapsed the License Order was signed by Judge Earl Cooper the 21st day of July, 1953. The applicants herein operated their liquor bar until the 12th day of October, 1953, at which time they were requested to close as a result of Judge Folta's

ruling of revocation of said license. Judge Folta presumably based his revocation on one or all of six reasons set out in an Order to Show Cause Why License Should Not Be Revoked. The Court has indicated that it is concerned here only with No. Six (6), which reads as follows: “(6) The census and list of process consenting to the issuance of the license failed to comply with the law which became effective June 30.” A Minute Order came out of Judge Folta’s office from Juneau, Alaska, October 12, 1953, revoking said Liquor License.

The applicants herein have now filed application for a renewal of their Liquor License and have done so with full compliance of the Laws of the Territory of Alaska. Proof of the matter has been taken by the testimony in open court of Tony Bordenelli, that he filed an application for renewal; a petition showing a  $\frac{2}{3}$  majority of signatures from a census prepared and filed of those eligible people residing within a one-mile radius of his place of business, an affidavit that he has not been guilty, and that his wife has not been guilty of an infraction of the Territorial Liquor Laws, and the necessary bond have also been filed with the Court. The applicants have shown by testimony that their place of business is closer than  $\frac{1}{4}$  mile from a church and school but make application under the new statute passed by the last Territorial Legislature, which is as follows: “\* \* \* Provided, however, that a license may be reissued for the sale of intoxicating liquor in



any building in which such sale was authorized by law at a time subsequent to March 23, 1949."

### Applicants' Contention

The applicants contend that they were authorized by law at a time subsequent to March 23, 1949, to sell intoxicating liquor in their building since they had a valid license from July 21, 1953, to October 12, 1953. They contend that although said license was revoked that it only took away their right and privilege previously granted and did not nullify the legality of their actions previous to that time.

The applicants contend that their petition and census under which they obtained their license was filed at a time when they were only required to follow the procedure as outlined by the law in effect at the time of the filing, to wit, ten days before the new law took effect. They contend that although the Order granting license was signed after the new law came into being that that did not place upon them the responsibility of having to abide by a law that did not exist at the commencement of the proceeding. The signing of the Order was in the nature of a *Nunc Pro Tunc* decree.

### Argument

The legal question presented by this application for a liquor license is: Does the Revocation of Liquor License on October 12, 1953, by Judge Folta Nullify, Vitate, or Invalidate Same in Such a Manner as to Preclude Applicants From Having

Been "Authorized by Law" to Sell Intoxicating Liquor at a Time Subsequent to March 23, 1949?

It is assumed by the applicants that the Court felt that the issue here stated hinged on one of the presumable reasons for the revocation, to wit: (6) The census and list of process consenting to the issuance of the license failed to comply with the law which became effective June 30, 1953.

The applicants base their argument for a renewal of license on two simple arguments:

I. The applicants obtained their original license under the laws in effect prior to June 30, 1953, and were only required to follow the procedural steps as set out by that law in effect at the time of commencement of proceedings.

II. That the license was a valid one while it existed and the revocation of same did not vitiate or destroy its legality while it existed.

### I.

The petition and census was filed by special permission of the Court ten days prior to the effective date of the new law on June 30, 1953. Chapter 116, SLA, 1953. The applicants complied with the laws in effect on the 20th day of June, 1953, which required that they have a majority of the residents as signers on their petition and which only required that they be outside 200 feet from church or school, and were granted a license under that law, and since the license was granted under that law, it

could not be subjected to the argument that the applicants had not complied with the new law. This reasoning is based on the following statute which reads as follows:

“Effect of repeals or amendments. The repeal or amendment of any statute shall not affect any offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment had not been made.” Civil Code, Sec. 19-1-1, ACLA, 1949.

The applicants submit that once having started their petition under one set of laws that they had a right to a prosecution to conclusion under those laws. The applicants do not think that the fact that signature was placed on order granting such license after the new law became effective in any way affected the legality of their application, or could have possibly brought it within the purview of another statute. The applicants contend that once they had filed petition and census under the old law as heretofore stated, that they had a “proceeding commenced prior to such repeal” and had “rights accruing”



under such action. This fact is especially important inasmuch as the applicants had been in the process of obtaining such license since March, 1953.

An amendment to such a law could not have a retroactive effect such as to nullify the action that had been set in motion. 50 American Jurisprudence 481.

## II.

The Order for License signed by Judge Earl Cooper was the authorization by law to sell liquor. It was made subsequent to March 23, 1949, and if the revocation of such license did not have the effect of nullifying said authorization from the beginning the applicants contend that this places them within the exception allowing a reissue of license. The only reason for a denial of such would be in the event that the applicants had been "guilty of a violation law." Surely the revocation of a license for the technical reasons as listed by Judge Folta could not be compared to a "violation of law," as outlined in the law, as for example, the selling of liquor to a minor. The applicants contend that their license was validly issued; that while in existence, it was good; that a revocation has only the effect of "extinguishing all rights and privileges acquired or held under it." Vol. 48, Corpus Juris Secundum, Intoxicating Liquors, Section 180. Effect of Revocation. No cases can be found to indicate that a revocation nullifies the validity of a license. It is good until revoked, suspended, or until it expires.

Can it be said that a revocation because of a more serious offense, such as selling to minors, has the effect of placing the operator in the position of having been operating a place of business illegally? This is an unusual case. It is one which, to applicants' knowledge, has not arisen in the Territory of Alaska, and authority with regard to such a revocation is difficult to find, but under Vol. 48, Corpus Juris Secundum, Intoxicating Liquors, Sec. 156, Evidence, the following is said which irrefutably shows that a revocation does not mean that the license was void from the beginning:

“\* \* \* An application for the renewal of license or permit which has expired, or for the restoration or renewal of a license which has been revoked, must be treated as a new application, throwing the burden of proof on applicant.”

While this pertains to the proof it indicates that a license can be renewed or reissued, following a revocation. The Territorial statutes also set out the reasons for a denial of a renewal—that based on a revocation for cause, to wit, the “violation of law,” meaning an infraction of the Territorial Liquor Laws.

### Summary and Conclusion

On the basis of the foregoing statements it is submitted that:

1. The applicants filed their original petition and census under the laws in effect prior to June 30, 1953, and qualified under those rules and regula-

tions, and therefore the original petition, census and license were not affected by the amendments which became effective June 30, 1953.

2. That a legal and valid license was issued to them July 21, 1953, and that such remained their authority to sell intoxicating liquors until October 12, 1953.

3. That revocation on October 12, 1953, did nothing more than take away rights and privileges granted under said license and did not have a retroactive effect but abolished only their authority by law to sell liquors.

<sup>12</sup> 4. That applicants were authorized by law to sell intoxicating liquors subsequent to March 23, 1949.

5. That they are entitled to a renewal based on such authorization in accordance with Chapter 116, SLA, 1953, which amends Subsection (3) of Section 35-4-15, ACLA, 1949, as amended by Chapter 83, SLA, 1949.

Respectfully submitted,

/s/ T. STANTON WILSON,  
Attorney for Applicants.

[Endorsed]: Filed December 30, 1953.

In the United States District Court for the District  
of Alaska, Third Judicial Division, Anchorage

LB&W 4004

UNITED STATES OF AMERICA

vs.

TONY BORDENELLI AND EYVOHN BOR-  
DENELLI

### COMPLAINT

1. Now comes William T. Plummer, United States Attorney for the Territory of Alaska, pursuant to the provisions of Section 35-4-21, A.C.L.A. 1949, and complains of the defendants and alleges:

2. That on December 31, 1953, by order of the United States District Court for the District of Alaska, Third Judicial Division, the Clerk of said Court issued to the said defendants Beverage Dispensary License No. 5884 to sell and serve beer, wine and hard liquors for consumption on his premises at Kenai, Alaska, up to and including the 31st day of December, 1954.

3. That the said license so issued as aforesaid is invalid and in violation of the provisions of Section 35-4-15, A.C.L.A. 1949, as amended by Chapter 116, S.L.A. 1953, in that the building or place where said liquors are sold and consumed is less than one-quarter mile from a school ground or church building.

Wherefore plaintiff prays that the defendants be

required to appear before the above-entitled Court on a date certain and show cause, if any they have, why said license should not be revoked.

WILLIAM T. PLUMMER,  
United States Attorney for the District of Alaska,  
Third Judicial Division.

By /s/ JAMES M. FITZGERALD,  
Assistant.

Duly verified.

[Endorsed]: Filed May 26, 1954.

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[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

Upon reading the verified complaint of the plaintiff on file herein, and good cause appearing therefore, upon motion of the United States Attorney for the District of Alaska, Third Judicial Division. It Is Ordered:

(1) That the defendants, Tony Bordenelli and Eyvohn Bordenelli, appear and show cause on the 25th day of June, 1954, at two o'clock p.m. of said day, before the above-entitled Court, or as soon thereafter as counsel can be heard, why liquor license No. 5884, issued to them on December 31, 1953, for the sale and consumption of intoxicating liquors during the calendar year 1954 on their premises at Kenai, Alaska, should not be revoked.



(2) That a copy of this order, together with a copy of the complaint herein, be served upon the defendants not later than the 9th day of June, 1954.

Dated at Anchorage, Alaska, this 26th day of May, 1954.

[Seal]      /s/ J. L. McCARREY, JR.,  
Judge, United States District Court for the District  
of Alaska, Third Judicial Division.

[Endorsed]: Filed and entered May 26, 1954.

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[Title of District Court and Cause.]

#### RETURN—SEVERAL DEFENDANTS

United States Marshal,  
Territory of Alaska,  
Third Judicial Division.

I hereby certify and return that I received the within and hereto-annexed OSC (Order to Show Cause) on the 28th day of May, 1954, and that on the 29th day of May, 1954, I personally served the same on Tony Bordenelli and Eyvohn Bordenelli, being the defendants named in the said Complaint and OSC Summons, in the city of Kenai, Third Judicial Division, Territory of Alaska, by then and there delivering to and leaving with Tony Bordenelli and Eyvohn Bordenelli, the said defendants, each personally, a true and correct copy of said OSC, and at the same time and place I delivered to and left with Tony Bordenelli and Eyvohn Bordenelli

nelli, the said defendants, each personally, a full, true and correct copy of the Complaint, in the action in said OSC referred to, certified to by the Clerk of Dist. Court, 3rd Div., Terr. of Alaska, attached to each copy of said OSC.

Date: May 29, 1954.

FRED S. WILLIAMSON,  
United States Marshal.

By /s/ ALLAN L. PETERSEN,  
Deputy.

Received May 27, 1954.

[Endorsed]: June 7, 1954.

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[Title of District Court and Cause.]

AFFIDAVIT

United States of America,  
Territory of Alaska—ss.

Tony Bordenelli, being first duly sworn upon oath, deposes and says:

That he is one of the owners of the Rainbow Bar, Kenai, Alaska; that he has been served with an Order to Show Cause why liquor license No. 5884, issued to him and his wife, Eyvohn Bordenelli, should not be revoked; that he has read the complaint filed in the above-entitled matter and admits that the "building or place where liquors were sold and consumed" is less than one-quarter ( $\frac{1}{4}$ ) mile

from a school ground or church building, but asserts that this information came before the Court at the hearing, which preceded the signing of the Order for the license; that said fact was presented to, and argued before, the Court; that affiant took the stand and testified that his liquor license was a renewal or reissue based on the fact that he had had a license during the year 1953, and that he was entitled to make application for another by virtue of that fact; that the issue was placed fairly and squarely before the Court; that during the year 1953 the minimum distance allowed by law between a building or place where liquors were sold and consumed and a school ground or church building was 200 feet, and he was beyond that distance.

That during the hearing all evidence and background pertaining to the matter was placed before the Court, fully advising the Court that such place of business came under the exception in the new 1953 law permitting places of business already established to continue in business although less than one-quarter ( $\frac{1}{4}$ ) mile from a school ground or church building.

That affiant has relied on the former decision in this matter; that he has paid out a large sum of money in attorney's fees; that he has made large investments and secured loans on the strength of his being allowed to carry on his business; that if such is denied him he will suffer great and irreparable business losses.



That he feels that the issue raised in the complaint has been adjudicated and should not be reopened, and reference is made to the files wherein a brief and affidavits were filed by affiant's attorney.

Further affiant sayeth not.

/s/ TONY BORDENELLI.

Subscribed and sworn to before me, a Notary Public in and for the Territory of Alaska, this 23rd day of June, 1954.

[Seal]      /s/ JULIANA D. WILSON,  
Notary Public in and for  
Alaska.

My commission expires: 8-16-54.

Receipt of copy acknowledged.

[Endorsed]: Filed June 23, 1954.

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HEARING ON ORDER TO SHOW CAUSE AS  
TO VALIDITY OF LIQUOR LICENSE

Now at this time Hearing on Order to Show Cause as to Validity of Liquor License in Cause No. L. B. & W. 4004, entitled In the Matter of the Application of Tony and Eyvohn Bordenelli, at Kenai, for a Beverage Dispensary Liquor License to expire December 31, 1954, came on regularly before the Court. Applicants present and with T. Stanton Wilson, their counsel. L. W. Kirkland, Assistant United States Attorney, present for and

in behalf of the Government. The following proceedings were had, to wit:

Argument to the Court was had by L. W. Kirkland, for and in behalf of the Government.

Argument to the Court was had by T. Stanton Wilson, for and in behalf of the Applicants.

Argument to the Court was had by L. W. Kirkland, for and in behalf of the Government.

Whereupon, Court directs respective counsel to file briefs if desired. Decision reserved.

Entered June 25, 1954.

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[Title of District Court and Cause.]

## BRIEF OF DEFENDANTS

### History of Matter

The question which confronts the Court in the above-entitled matter is whether or not a reissue or renewal of a Liquor License as provided for in Chapter 116, Session Laws of Alaska, 1953, to wit: "provided, however that a license may be reissued for the sale of intoxicating liquors in any building in which such sale was authorized by law at a time subsequent to March 23, 1949," applies to a case where a license has expired, been suspended, or revoked, before application for renewal has been filed.

The defendants, doing business as the Rainbow Bar, Kenai, Alaska, had their Liquor License re-

voked by Judge Folta on the 12th day of October, 1953, not for "cause" but for procedural reasons. The defendants filed application for a renewal of liquor license based on the above-mentioned statute, which provides the exception that permitted them to obtain a renewal, although their building is less than one-quarter of a mile from a church building or school ground. The order granting the 1954 license was signed by Judge J. L. McCarrey, Jr., on December 31, 1953, after a hearing was had in open Court, at which time Tony Bordenelli testified to the effect that said place of business was less than one-quarter of a mile from a church building or school ground, and testimony qualifying on all other requirements was taken.

On May 26, 1954, a complaint was filed by the United States Attorney for the District of Alaska, Third Judicial Division, alleging a violation of the provisions of A.C.L.A. 1949, Section 34-4-15, as amended by Chapter 116, SLA 1953, in that the building or place where said liquors are sold and consumed is less than one-quarter of a mile from a church building or school ground, and an Order to Show Cause why the license should not be revoked was issued. Argument of the matter on the date set for showing cause why the license should not be revoked was limited to the issue of whether defendants could get a reissue or a renewal of a license that had been revoked (not for violations of the liquor laws, but for defects in the application procedure) under the amended statute, Chapter 116, SLA 1953.

## Defendants' Contention

The defendants contend that they were authorized by law at a time subsequent to March 23, 1949, to sell intoxicating liquor in their building, inasmuch as they had a valid license from July 21, 1953, to October 12, 1953. They contend that although said license was revoked that it only took away their right and privilege granted for the year 1953.

The defendants further contend that inasmuch as they were granted a reissue of their license on the 31st day of December, 1953, by order of the United States District Court for the District of Alaska, Third Judicial Division, on the basis that same was a reissue of a license coming within the purview of the statute, Chapter 116, SLA 1953, that same should not be revoked arbitrarily; that the issue as presented in the complaint filed by the United States Attorney, to wit: "that said bar was less than one-quarter of a mile from a school ground or church building," was squarely faced at the hearing for the application for the license granted on December 31, 1953, and by the testimony of one of the applicants, Tony Bordenelli, it was definitely a considered fact that the building in which the applicants were doing business was less than the one-quarter of a mile as prescribed by law. But as was definitely brought to the attention of the Court, said license was granted despite that fact and was done so solely by classifying said location as coming within the exception as provided under the statute,

Chapter 116, SLA 1953. It is contended that since this issue was determined at the original hearing, and the issue raised in the complaint heretofore mentioned is no different, the decision is *res judicata*, and should not be reversed or revoked except for just cause, as set out in the statutes setting forth the various liquor violations. "It has been held that, if the hearing is before a court, its judgment conclusively determines all the points which it is required to consider, so that these matters are *res judicata* on an application for a renewal of the license, unless fresh issues are raised by a remonstrance; and an excise commissioner has been held to act judicially, so that his findings of fact are conclusive; \* \* \*" 48 C.J.S., *Intoxicating Liquors*, Section 157, page 259.

### Argument

One of the legal questions presented by this proceeding is: Can a liquor license that has been suspended, revoked or has expired, be renewed or reissued at a time subsequent to the revocation, suspension or expiration date?

The second legal question presented by this matter is: Can a liquor license once having been granted by order of the District Judge, be revoked at the discretion of the District Judge without cause or violation subsequent to the issue of said license?

### I.

It is the contention of the defendants that it is possible to renew a license or permit which has



expired, or restore or renew a license which has been revoked. In 48 C.J.S., Intoxicating Liquors, Section 156, Evidence, the following is said which shows irrefutably that a revocation does not mean that the license was void from the beginning:

“\* \* \* An application for the renewal of license or permit which has expired, or for the restoration or renewal of a license which has been revoked, must be treated as a new application, throwing the burden of proof on applicant.”

While this pertains to the proof, it indicates that a license can be renewed or reissued, following a revocation. Should it be argued that the application should then be treated as a new application, the defendants still contend that under the statute as written, even a new application must be allowed if in fact applicants had a building wherein they had sold intoxicating liquors and had a license to do so at a time subsequent to March 23, 1949.

The law as stated in Chapter 116, SLA 1953, definitely makes an exception to the law with reference to proximity to church or school. There could be no other legislative intent than to make provision for those people who had once done business in a building at a time subsequent to March 23, 1949, to protect the right and privilege to do business in that location, once having been granted that privilege, and having made investments in same. Chapter 83, SLA 1949, amending Section 35-4-15, A.C.L.A. 1949, and making a similar provision, stated: “\* \* \* provided however that a license may

be reissued for the sale of intoxicating liquor in any building in which the sale of intoxicating liquor was at the time of the passing of this Act authorized by law." This was approved on March 23, 1949. Can it not be said then that the legislative intent is positively clear that it hoped to protect those people who were doing business in a location any time as far back as March 23, 1949? Otherwise the 1953 law would have made the exception effective at the time of the passing of the 1953 Act.

The statute must be strictly construed, and inasmuch as there is no other legislation similar to this to look to as a guide, we can interpret in no other way than that this is an exception under which those people who have done business in any of the years 1949, 1950, 1951, 1952 and 1953 are protected and are allowed to continue in business. It does not matter that there may have been a period of time in between those years that the business was not operated, and no matter whether it be a good policy or a bad one, that is the law as written, and must be construed as written. If it is a bad law, it must be repealed by the legislature and not by the Court.

## II.

The law under Section 35-4-21, A.C.L.A. 1949, permits the judge of the District Court to revoke a liquor license upon the filing of a complaint by the United States Attorney, and sets forth certain violations of the law upon which such licenses may be revoked. It is contended here that said authority

is confined to a showing of violations subsequent to the issuance of the license, and that unless a showing is made that such violations have occurred, that a license should not be disturbed by the Court, if all facts and issues were presented to the Court at the hearing of the application. For a court to reverse itself or change its mind or admit error in granting a license for a reason the issues of which had once been determined, would place the operators under such a license in a position of uncertainty, and such cannot be the interpretation of the statute providing authority for revocation.

In this particular case the Court has indicated that the proximity to church and school was not considered at the time of the hearing and the signing of the order. The defendants feel that the testimony of Tony Bordenelli at the hearing brought directly to the Court's attention the fact of the nearness to the church and school; that much emphasis was placed on that fact, and much emphasis was brought to bear to show that they were within the exception of the new law as set forth in Chapter 116, SLA 1953.

#### Conclusion

On the basis of the foregoing, it is submitted that the defendants are entitled to retain the liquor license granted to them and that the same should not be revoked.

Respectfully submitted,

/s/ T. STANTON WILSON,



By /s/ J. D. WILSON,  
Attorneys for Defendants.

Dated June 30, 1954.

Receipt of copy acknowledged.

[Endorsed]: Filed June 30, 1954.

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[Title of District Court and Cause.]

### MEMORANDUM OPINION

This matter comes before the court based upon an order to show cause why the liquor license of the above-named applicants should not be revoked for the reason that the building or place where said liquors are sold and consumed is less than one quarter of a mile from a school ground or church building in violation of the provisions of Section 35-4-15 A.C.L.A. 1949, as amended by Chapter 116 Session Laws of the Territory of Alaska, 1953.

A check of the United States District Court Clerk's office reveals that on the 13th day of March, 1953, the applicants filed an application for an LB&W license under file No. 3750. The file further discloses that protest petitions were filed and that a hearing on said application was commenced on the 4th day of May, 1953, before the Honorable Anthony J. Dimond, United States District Judge for the Third Division of the Territory of Alaska. Just prior to the conclusion of the hearing attorneys for the applicants moved the court for leave to submit

written calculations or in the alternative to submit and file a new petition and at the conclusion of the hearing the court granted applicants' motion to file briefs or calculations and the applicants were given time in which to file briefs and the protestants given time in which to file answering briefs and the motion to file a new petition was denied.

On May 27, 1953, applicants filed a motion to withdraw their application without prejudice with right to make another application for the reasons:

A. That the census and consent petition did not comply with the law.

B. That the 1953 Legislature for the Territory of Alaska had modified the liquor license law and that the applicants would be severely prejudiced if they were not allowed to make a showing under the new existing liquor law.

In conformance with the motion the Honorable George W. Folta signed an order on the 16th day of June permitting the applicants to withdraw the pending application without prejudice to the rights of the applicants to file a new petition herein, as there was no other court to handle the matter due to the untimely death of the Honorable Anthony J. Dimond, the latter part of May.

Thereafter, on the 29th day of June, 1953, by affidavit one of the applicants, Tony Bordenelli, filed a supplemental consent petition and on the 21st day of July, 1953, a license was issued by the Honorable J. Earl Cooper, at that time Acting Judge at Nome, Alaska. Thereafter, on the 5th day

of September, 1953, an order to show cause why the license should not be revoked was signed by the Honorable George W. Folta, which sets forth the following:

“It appearing from the records and file in the above-entitled matter that in the issuance of the license the law was not complied with in the following particulars:

“(1) No application was on file, the original having been denied and withdrawn.

“(2) No hearing upon any application was set.

“(3) The protestants were not notified.

“(4) The Court failed to consider any application before granting the license.

“(5) The Court failed to consider the protests on file.

“(6) The census and list of process consenting to the issuance of the license failed to comply with the law which became effective June 30.”

Thereafter, on the 12th day of October, the Honorable George W. Folta revoked the license upon the grounds as set forth in the order to show cause. On the 27th day of October the applicants, by their attorney, filed a motion to reopen the application of the applicants revoked by court and after hearing upon the motion and the testimony of the witnesses by the Honorable George W. Folta on December 4, the court denied the motion to reopen the matter.

Prior to the entry of the order on December 10 the applicants filed a new application for the year 1954 on the 7th day of December, and in conformance with the practice of the court this matter was set down and a hearing was had on the 29th day of December, 1953, at which time no protestants appeared, although a letter of protest had been received on the 24th day of December, reference the above-entitled matter and after a consideration of said application the court granted a liquor license for the year 1954, however, the court inadvertently failed to take into consideration the question of renewal of a liquor license at the time of the hearing of this application, being principally concerned with the location of the business in relation to the new law as to distance from church or school and not the legal interpretation of the question of renewal of license as is contemplated by Section 35-4-15 of the 1949 Compiled Laws of the Territory of Alaska, as amended by Chapter 116 of the 1953 Session Laws of the Territory of Alaska.

The sole question to be determined by the court in this matter is: Are the applicants entitled to a renewal of their liquor license for the year 1954 as contemplated by Section 35-4-15 of the 1949 Compiled Laws of the Territory of Alaska as amended by Chapter 116 of the 1953 Session Laws of the Territory of Alaska, after the 1953 license was once issued and then later revoked?

I am of the opinion that this question is best answered upon a definition of the word "renewal."

A scrutiny of the cases attempting to define the word "renewal" reveals that such definition is not easily defined legally (U. S. Campbell River Timber Co. vs. Vierhus, 86 F. 2d 675; Sheldon vs. Mississippi Cottonseed Products, 108 A.L.R. 763; 54 C.J.S. 379, Section 1; 76 C.J.S. 1146). Webster's New International Dictionary, Second Edition, defines the word "renewal" n. "renewing, or state of being renewed." The same authority defines the word "renew" v. transitive:

(1) To make new again; to restore to freshness, perfection, or vigor; also, to begin again as new; to reassume; as, to renew one's strength.

(2) To make new spiritually; to regenerate . . .

(3) To restore to existence; re-establish; recreate; rebuild; as, to renew the old splendor of a palace; to revive; to resuscitate; as, to renew the sentiments of youth.

(4) To repeat; to go over again; to make or do again . . .

(5) To begin again; to recommence; to resume...

(6) To replace; also, to restore to fullness or sufficiency . . .

(7) To grant or obtain an extension of; to continue in force for a fresh period.

Thus, as Volume 76 C.J.S. p 1164 aptly states "The term 'renewal' has no strictly legal or technical signification, and it is not a word of art. It may



be given different meanings, and it has different meanings, varying with the subjects with reference to which it is used. The cases construing the proper meaning to be ascribed to the term are by no means uniform; contracting, and the construction is controlled by the intention of the parties.”

It goes without saying that the liquor business must be carefully supervised and the common interest of the general public should be the guide post in issuing and renewing of licenses (*Sicherman vs. Driscoll*, 45 Atl. 2d 620). The issuance of the original license does not confer upon the licensee a right to insist that future application for renewal be governed by law in effect at the time of issuance of original license (53 C.J.S. 641, 642; 42 N.Y. Sup. 2d 498) and further the privilege conferred upon the licensee is purely personal in nature and is available and affords protection to the original licensee and to him alone and no others (53 C.J.S. 642, Section 42; 73 NE 884). Strictly speaking a liquor license is not a property or a property right nor does it create a vested right (53 C.J.S. 499, Section 2; 13 F. 2d 500; 158 P. 2d 199 and 36 NY Sup. 2d 774).

I am of the opinion that the renewal of liquor licenses the term renewal must be strictly construed and, therefore, the word cannot be defined in as broad a sense, but rather must be limited.

In this case we have the further problem of defining the word “revocation” or to revoke, since this license was revoked. Webster’s New Inter-



national Dictionary, Second Edition, defines the word "revoke" v.:

(1) "To annul by recalling or taking back; to repeal; to rescind; to cancel; to reverse; as anything granted by special act; as, to revoke a will, license, grant, law."

And the same authority defines revocation as n.:

(1) "Act of recalling, or calling back, or state of being recalled; recall.

(2) "Act of revoking; act by which one, having the right, annuls an act done, a power or authority given, or a license, gift, or benefit conferred; reversal; withdrawal, as the revocation of an edict, a power, a will, or a license.

(3) "Recantation; retraction. Obs."

77 C.J.S. 362 defines the word "revoke" as follows:

"The term 'revoke' is variously defined as meaning to recall, cancel, or set aside; to recall what one has done or promised; to annul; to annul or make void by recalling or taking back; to repeal; to rescind; to call back; to reverse; to abolish; to take back; to withdraw.

"The word carries with it the idea of cancellation by the same power which originally acted, and not the setting aside of an original order by another form of power or jurisdiction. It does not mean 'repudiation.'

“ ‘Revoke’ has been held equivalent to, or synonymous with, ‘cancel,’ see 12 C.J.S., p 936, note 19.3, ‘recall,’ see 75 C.J.S., p. 640, note 45; ‘repeal,’ see 76 C.J.S., p 1176, note 61, and ‘rescind,’ see ante p 276, note 37.

“It has been compared with, or distinguished from, ‘alter,’ see 3 C.J.S., p 898, note 90; ‘annul,’ see 3 C.J.S., p 1389, note 22; ‘regulate,’ see 76 C.J.S., p 615, note 79, and ‘rescind,’ see ante, p 276, note 38.

“ ‘Revoked’ has been held equivalent to ‘ceased,’ see 14 C.J.S., p 59, note 43, and ‘vacated,’ and has been distinguished from ‘suspended.’ ”

As is noted in the definition of the word “revoke” set forth in C.J.S. that the word “revoke” has been held equivalent to “ceased.” In other words, when the license was revoked in 1953 the same was vacated, cancelled, and these words carries with them the idea of an absolute cancellation.

It is to be noted in this case the same authority which granted the license for the year 1953, through the then Acting Judge, invoked its plenary powers to revoke the same, and, as defined by the dictionary and further amplified by C.J.S., once the license was revoked it became a nullity or, in other words, was taken out of existence; hence, it would be impossible to recreate something that no longer existed. Therefore, with the passing of the rights and privileges under the old license into an eternity where the same could not be revived, the full force and effect of the 1953 Session Laws automatically

came into effect. This provided, among other things, that no establishment could obtain a liquor license which was less than one-quarter of a mile distance from a school or church outside of incorporated cities, therefore, the qualifications set forth in Chapter 116 of the 1953 Session Laws of the Territory of Alaska could not be met by the applicants, hence a renewal of that license could not be obtained because the 1953 license had become a nullity and there was nothing left to renew.

I, therefore, am of the opinion that the 1954 license of the applicants should be revoked for the reasons set forth. Revocation of the applicants' liquor license is hereby ordered and the District Attorney's office is instructed to prepare an order of revocation accordingly.

Counsel for the applicants has submitted a brief and cited some law to the effect that this court does not have the authority to revoke the 1954 liquor license stating, among other things, that once a license was granted it became *res adjudicata*.

I am of the opinion that counsel's theory of the law in this respect is not in point and his position is so untenable that it does not warrant further consideration.

Dated at Anchorage, Alaska, this 2nd day of July, 1954.

/s/ J. L. McCARREY, JR.,  
District Judge.

[Endorsed]: Filed July 2, 1954.

[Title of District Court and Cause.]

### M. O. RENDERING ORAL DECISION

Now at this time the Court rendered oral decision in cause No. L. B. & W. 4004, entitled in the Matter of the Application of Tony and Eyvohn Bordenelli, d/b/a Rainbow Cafe Annex at Kenai, Alaska, for a beverage dispensary liquor license to Expire December 31, 1954, and License Revoked, written decision to follow.

Entered July 2, 1954.

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[Title of District Court and Cause.]

### ORDER OF REVOCATION OF L. B. & W.

No. 5884

This matter coming on to be heard upon the motion of William T. Plummer, United States Attorney, for an order of revocation of L. B. & W. License No. 5884, issued to Tony and Eyvohn Bordenelli, doing business as Rainbow Cafe Annex, and the Court having considered the motion and having heard Lynn W. Kirkland, the Assistant United States Attorney, and T. Stanton Wilson, Esquire, attorney for the defendants, and the Court being fully advised in the premises,

It is Hereby Ordered that the said license be and hereby is revoked, and

It is Further Ordered that the United States

Marshal or his authorized representative forthwith seize the said license and return the same to the Clerk of the United States District Court for the Third Division, Territory of Alaska.

Dated at Anchorage, Alaska, this 27th day of July, 1954.

/s/ J. L. McCARREY, JR.,

District Judge.

[Endorsed]: Filed and entered July 27, 1954.

I Hereby Certify, that I received the within Order of Revocation of License No. 5884 on the 27th day of July, 1954, and personally served same on the 29th day of July, 1954, by delivering to and leaving with Tony Bordenelli a copy thereof and taking into my possession Territory of Alaska Liquor License No. 5884, and I now return the said Liquor License into Court.

Return Date: Aug. 2, 1954.

/s/ FRED S. WILLIAMSON,

U. S. Marshal.



\$500.00

No. 5884

Territory of Alaska  
Division Number Three  
For a Beverage Dispensary

## LIQUOR LICENSE

Received from Tony and Eyvohn Bordenelli d/b/a Rainbow Cafe Annex, the sum of Five Hundred and no/100ths Dollars, for License for carrying on the kind of liquor business above named at Kenai, Territory of Alaska, Division Number Three, for the calendar year (or period) ending December 31, 1954.

Issued in compliance with the order of the District Court of Alaska, Division Number Three, duly made and entered December 31, 1953.

Issued at Anchorage, Alaska.

[Seal]      /s/ M. E. S. BRUNELLE,  
Clerk of the District Court of  
Alaska, Third Division.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 10, 1954.

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[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice is Hereby Given, that Tony Bordenelli and Eyvohn Bordenelli, defendants above named,



hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the Order of Revocation of L B & W License No. 5884, entered in this action on the 27th day of July, 1954.

Dated this 20th day of August, 1954, at Anchorage, Alaska.

WILSON & WILSON,

/s/ T. STANTON WILSON,

Of Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 20, 1954.

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[Title of District Court and Cause.]

MOTION TO REINSTATE LIQUOR LICENSE  
AND SUSPEND THE ORDER OF RE-  
VOCATION PENDING APPEAL

Defendants, Tony Bordenelli and Eyvohn Bordenelli, move the Court for an Order Suspending the Order of Revocation of L B & W License No. 5884, and Reinstating said License to the defendants and staying further proceedings to the order of revocation entered on the 27th day of July, 1954, pending the appeal herein, upon the filing of a bond in such amount as the Court may direct, for the reason that irreparable damage will be done if the

defendants are forced to close down the operation of their business pending the appeal herein.

WILSON & WILSON,

/s/ T. STANTON WILSON,  
Of Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 20, 1954.

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[Title of District Court and Cause.]

HEARING ON MOTION TO REINSTATE  
LIQUOR LICENSE AND SUSPENSION  
OF REVOCATION PENDING APPEAL

Now at this time hearing on motion to reinstate liquor license and suspension of revocation pending appeal in Cause No. L.B. & W. 4004, entitled In the Matter of the Application of Tony and Eyvohn Bordenelli, at Kenai for a beverage dispensary liquor license to expire December 31, 1954, came on regularly before the court, the applicant represented by T. Stanton Wilson of their counsel, and L. W. Kirkland, Assistant United States Attorney, appearing for and in behalf of the Government. The following proceedings were had, to wit:

Argument to the Court was had by T. Stanton Wilson, for and in behalf of the applicant.

Argument to the Court was had by L. W. Kirkland, Assistant United States Attorney, for and in behalf of the Government.

Argument to the Court was had by T. Stanton Wilson, for and in behalf of the applicant.

Whereupon the Court, having heard the arguments of respective counsel and being fully and duly advised in the premises, Denied Motion.

Entered September 17, 1954.

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[Title of District Court and Cause.]

### COST BOND

No. LB&W 4004

Know All Men by These Presents: That we, Tony Bordenelli and Eyvohn Bordenelli, as Principals, and Continental Casualty Company, a corporation organized under the laws of the State of Illinois and authorized to transact surety business in the territory of Alaska, As Surety, are held and firmly bound unto the United States of America, the plaintiff above named, in the full sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The Condition of the Above Obligation Is Such That, whereas the defendants have appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed August 20, 1954, from the judgment of this court entered July 27, 1954, if the defendants shall pay all costs adjudged against them if the appeal is dismissed or the judgment affirmed or such

costs as the appellate court may award if the judgment is modified, then this bond is to be void; but if the defendants fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated this 17th day of September, 1954.

/s/ TONY BORDENELLI,  
Principal;

/s/ EYVOHN BORDENELLI,  
Principal;

CONTINENTAL CASUALTY  
COMPANY,  
Surety;

By /s/ GRACE M. McCONNELL,  
Attorney-in-Fact.

[Endorsed]: Filed September 21, 1954.

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In the United States Court of Appeals for the  
Ninth Circuit

TONY BORDENELLI and EYVOHN BORDE-  
NELLI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

### MOTION

Comes now T. Stanton Wilson of Wilson & Wilson,  
attorneys for appellants, Tony Bordenelli and

Eyvohn Bordenelli, and respectfully moves the Court that he be allowed an extension of thirty days in which to furnish Transcript of Testimony, for the reasons set forth in the accompanying Affidavit.

Dated at Anchorage, Alaska, this 21st day of September, 1954.

WILSON & WILSON,

By /s/ T. STANTON WILSON,  
Of Attorneys for Appellants.

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In the United States Court of Appeals  
for the Ninth Circuit

TONY BORDENELLI and EYVOHN BORDE-  
NELLI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

AFFIDAVIT

United States of America,  
Territory of Alaska—ss.

T. Stanton Wilson, being first duly sworn, upon oath, deposes and says:

That he is one of the attorneys for the Appellants, Tony Bordenelli and Eyvohn Bordenelli, in the above-entitled matter; that an extension of time for filing Transcript of Testimony in the above-entitled



matter has been requested, for the reason that the District Judge for the Third Division, Territory of Alaska, is out of town and will not be available until the 11th day of October, 1954; that the record of testimony is in the hands of the court reporters; that one of the court reporters is with the Court in Seward, Alaska, and that the other is in the city of Fairbanks, Alaska, and will not return until the 27th day of September, 1954; that the reporters have stated that they will need a few days following that time, in which to prepare the Transcript of Testimony; that this affidavit is not made for the purpose of delaying this matter; that every effort will be made to have the Clerk of the Court forward the Transcript of Testimony at the earliest possible time.

/s/ T. STANTON WILSON.

Subscribed and sworn to before me, a Notary Public, within and for the Territory of Alaska, this 21st day of September, 1954, at Anchorage, Alaska.

[Seal]      /s/ JULIANA D. WILSON,  
Notary Public in and for  
Alaska.

My commission expires: 8-16-58.

(Certified true copy.)

[Endorsed]: Filed September 22, 1954.



In the District Court for the District of Alaska,  
Third Division  
No. L. B. & W. 4004

In the Matter of

The Application of TONY and EYVOHN BORDE-  
NELLI, d/b/a RAINBOW CAFE ANNEX  
at Kenai, Alaska, for Beverage Dispensary  
Liquor License to Expire December 31, 1954.

Before: The Honorable J. L. McCarrey, Jr.,  
U. S. District Judge.

December 29, 1953, 10:00 A.M

Appearances:

For the Applicants:

T. STANTON WILSON,  
Attorney at Law.

### PROCEEDINGS

The Court: Mr. Wilson, you may proceed. Mr. Wilson, the Court will point out to you in this particular case that he has gone over the file and the big problem that confronts the Court in this case is the fact that you may have had a license during the year 1953, but that was revoked for the following reasons: (1) No application was on file, the original, of course, was denied and withdrawn. (2) No hearing on any application was set. (3) The protestants were not notified. (4) The Court failed to consider any application before granting of the

license. (5) The Court failed to consider the protests on file, and (6) The census and lists of process consenting to the issuance of license failed to comply with the law which became effective June 30. Now, the first five of these reasons probably could be overlooked, the reason being that they are administration. Most of them were caused by that particular procedure, but No. 6 is a different story entirely as the Court views it and this, under the law as passed by the Legislature of 1953, was absolutely mandatory that there be a full compliance with the consents, which in this case was two-thirds within a one-mile limit. Now, based upon that the applicants did not comply with the law, and, therefore, was subject to collateral attack and as a result thereof was revoked. Now, did you ever have a bona fide license for the year 1953 so as to put you within the pervue of the exception of your liquor establishment within one-quarter of a mile of a school as set forth [2\*] in the 1949 Session Laws and the Court's belief at this time is that this 6th exception of the reasons given for why the liquor license was revoked virtually did away with the right to have a license at any time and, therefore, you would not come within the exception as set forth.

Mr. Wilson: Your Honor, the assertion in Number 6 of the Order to Show Cause isn't an assertion in itself and is not necessarily in evidence in the case, however, it would be, was our intention and still is our intention that this petition was filed before June 30 and would, therefore, become effective

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

under the old statute and, therefore, would not require the two-thirds majority that is required under the new statute. Now, if you will refer to the record you will see that their petition was filed before June 30.

The Court: That isn't the point though. The question is, when was the license granted and under what law was the license granted?

Mr. Wilson: That is our argument that the law has granted, although the liquor license was signed after June 30, it was granted under a petition filed before the new law became effective and I don't believe that the signing of the order would necessarily affect it. I think it would be retroactive in that respect.

The Court: But then here we have an order to show cause why a license should not be revoked and among one of the reasons [3] No. 6 was given which we are directing our attention. You say that it was not necessarily found upon that basis. Well, the Court seems to be bound to the contrary because at that time, on the 12th day of October, 1953, we have the Judge holding, "It is hereby ordered that the beverage dispensary license for 1954 issued to Tony Bordenelli and Eyvohn Bordenelli d/b/a Rainbow Cafe Annex be and is hereby revoked."

Mr. Wilson: The Court did not state that it found under Section 6.

The Court: Well, wasn't there a hearing on it?

Mr. Wilson: There was no hearing. That was issued. That is why I filed a motion to reopen the

case. There was no hearing on that and it was filed from Juneau.

The Court: But then the Court must have given that as one of the reasons. Your statement is rebuttable because the Court signed it as one of the reasons and you state that he may not have found on that reason. That is rebuttable because the facts deny that statement.

Mr. Wilson: Now, your Honor, it is our contention that even though the license was revoked that that license was in effect from June 21 until October 12 and while it was in effect the Rainbow Cafe and Annex were authorized by law to operate and until that license was revoked they were operating a legal business. That being the case, it is our contention that they were, subsequent to April 23, 1949, authorized by law to establish a [4] place of business.

The Court: That is—let me just inquire though. That is your premise and that is your position and maybe counsel is right, but on the other hand if you obtained the license through fraud or misrepresentation, which the Court apparently found, then were you legally operating under a legal authorized license, because fraud violates everything it touches.

Mr. Wilson: We take issue with any misrepresentation or fraud and there certainly is nothing in the records to indicate there was anything false or anything misrepresented.

The Court: Counsel is correct in that respect, excepting this, you didn't—the Court was using that



as an example. For instance, you didn't comply with the law and you are right the Court does not infer there was any fraud or misrepresentation, but the fact that you didn't comply with the law due to, maybe your own fault or somebody else's fault, the mere fact the Court would issue a license under, well, misinformation, do you feel you had a bona fide license?

Mr. Wilson: I do, your Honor. I feel that there was a bona fide license and that it was revoked and that the only way the Court can deny a license under this law, under an authorized business to do business since April 23, 1949, is when the petitioner has been convicted of violation of the Territorial Liquor Laws. Now, the fact that the applicant technically was incorrect in filing his application for the liquor license does not mean that [5] he was guilty of violation of the laws, as such, the Territorial Liquor Laws and from all the interpretations of the statute we can find the violation of the liquor laws refers to such violations as a person can be found guilty of; such as, selling the liquor to a minor and it is, therefore—I submit, your Honor, that the license was valid while in effect and was in effect until October 12, 1953, therefore bringing him under the statute. Now, suppose that he had had his license and the matter had expired the year 1950. The same situation would have been presented to the Court.

The Court: Yes, but that is different though, Mr. Wilson. In that case he had a valid license. In this case the Court doubted very much he had a valid license.

Mr. Wilson: I say this: Does the Court feel that a person having had a license from July 23 until October 12 and had had it revoked for a specific violation of the liquor laws that would have been a revocation. Had that been the case would the Court say that the petitioner never had a valid license?

The Court: No, that is——

Mr. Wilson: It is the revocation that makes the license void.

The Court: Excepting in this case here the Court doubts that, even though you may in fact had the license, hung it upon the wall, it is doubtful in this Court's mind that you ever had a valid license. [6]

Mr. Wilson: We submit that the Third District Court judge signed the license and it was valid until revoked.

The Court: There is no question about that having been done, but if that was obtained without full compliance of the law, the failure to comply with the law initiated the variation of the law itself as if by order of the Court. Well, the Court feels that that is tantamount to the whole application and the Court further feels that counsel should submit some law on that point. I mean, you can have an opinion and the Court can have an opinion.

Mr. Wilson: I would like very much to be allowed to present a brief in that respect and would the Court like for me to put on proof of the case this morning or has there been protests that would justify going ahead with the matter?

The Court: There is only this one protest writ-



ten by Mr. Thornton and since the Court feels that the question of liquor licenses is not a right, but a privilege it must be strictly construed and, therefore, you have the burden of proof. I feel you should put on sufficient proof so as to overcome, even though these protestants are not here, and rebut their protests because you have the burden of proof.

Mr. Wilson: May I have the Court point out the substance of the protest?

The Court: “\* \* \* Since this place of business, if the Rainbow Cafe, is within one-quarter mile of the school, it seems [7] a wasted effort to make further protest. Yet, because of our past experience with the applicants, I feel required to raise my voice \* \* \*” Therefore, it must be principally the question that it does come within one-quarter of a mile.

Mr. Wilson: May I ask where the letter was written?

The Court: It was written from Washington—Sedro-Woolley, Washington, and written on the 24th of December. That came in response to a letter directed by the Chief Deputy Clerk which, I think, she did—well, since there had been protests on previous occasions, to advise them of the time that was coming up for hearing so they would know as to the time of the hearing and to be present if they so desired. Just a moment, please, the Court will check to see if there is anything else.

Mr. Wilson: May I point out to the Court, this is a peculiar case and there has been some controversy and technicalities have arisen which pre-

vented the petitioner from obtaining license the first time. Although the clerk of the Court was not obligated by law to notify any of the protestants, this protestant was notified and this protestant that you mentioned is no longer a resident of Kenai and is in the state of Washington.

The Court: I didn't say that either, Mr. Wilson. He just wrote the letter from—just a moment, please.

Mr. Wilson: I will at this time request permission to call Tony Bordenelli.

The Court: Just a moment, please, let me see if there [8] are any other points. He refers to the fact that the townsite map also bears it out, a U. S. Government Survey, that is reference to the fact it is within one-quarter of a mile from the school. He does not state that he has left the Territory of Alaska. You may proceed then.

Mr. Wilson: Did your Honor—did I understand he did not state that he had left the Territory of Alaska?

The Court: Yes, that is right.

Mr. Wilson: If I may call to the Court's attention, I believe that he stated he was no longer living in Kenai, that he did own property in Kenai.

The Court: He says, “\* \* \* Unfortunately, I cannot appear for the hearing on the 29th of December. Until the moral atmosphere in Kenai clears, I prefer to keep my wife and three daughters elsewhere \* \* \*” He didn't say himself, however.

Mr. Wilson: Yes.

The Court: He said, “\* \* \* Nevertheless, ev-

everything we own is invested there and being forced to return for economic reasons is very possible. Over the past five years we have worked for the community's best interests because it coincided with our own. This protest is no exception \* \* \*'' You may call your witness.

ANTHONY BORDENELLI

being first duly sworn upon oath, testifies as follows on

Direct Examination [9]

By Mr. Wilson:

Q. Would you state your full name to the Court, please? A. Anthony Bordenelli.

Q. Are you one of the owners in the Rainbow Cafe and Rainbow Cafe Annex? A. I am.

Q. Did you file an application for a liquor license? A. I did.

Q. What date did you file?

A. I believe it was July 21 that I filed it.

Q. Your renewal license—did you file a renewal license? A. Oh, yes, December 7.

Q. 1953? A. Yes.

Q. Did you file that on behalf of yourself and your wife? A. I did.

Q. What is your wife's name?

A. Eyvohn Bordenelli.

Q. Along with your application for a liquor license for the Rainbow Cafe Annex did you also file a census of those people living within a quarter mile radius of your place of business?

(Testimony of Anthony Bordenelli.)

A. Yes, I had Betty Bross—she got the census. She is Commissioner down there.

Q. She prepared the census for you at your instigation and [10] request? A. Yes, she did.

The Court: May the Court interrupt you. Did you say a quarter of a mile?

Mr. Wilson: Yes.

The Court: Well, the census must be within one mile.

Mr. Wilson: May I ask the Court if he would refer to the census in the application, please, sir.

The Court: "We, the undersigned citizens of the United States and bona fide residents of the Territory of Alaska, over the age of 21 years reside within one mile of the Rainbow Cafe."

Mr. Wilson: Is that right, two-thirds within one mile?

The Court: That is correct.

Q. (By Mr. Wilson): How many did you have listed on that census? A. 252 on the census.

Q. Did you circulate a petition thereafter for signatures of those people who were in favor of your having a liquor license?

A. Yes, sir, those who were eligible to sign for a liquor license.

Q. How many of those signatures do you have?

A. 181.

Q. Was that two-thirds majority of the census?

A. I believe it is.

Q. Are you and your wife citizens of the United States? [11] A. Yes, born here.

(Testimony of Anthony Bordenelli.)

Q. Now, how far is your place of business from the nearest school ground or church building?

A. I believe 950 feet from the church and I think it is about 1500 from the school. It is further than any place down there.

Q. Did you have that area measured or did you measure it yourself?

A. I took it off the map.

Q. Measured it off the map?

A. Yes.

Q. Now, you had filed a previous application for a liquor license, had you not?

A. Yes, I did.

Q. When was that license granted?

A. Yes, it was. We turned it in, oh, I believe it was the 28th of June, I believe it was. The new law went into effect two days afterwards.

Q. About the 28th of June you filed that application?

A. I think it was—30th or 31st of that month the——

Q. You had waited the necessary three weeks?

A. I believe I got it on July 21, the license.

Q. Was that—what date was that license granted?

A. I believe it was July 21.

The Court: That is correct, the license.

Q. Did you go in business immediately following that time? [12]

A. After I got my license?

Q. Yes.

A. Yes.

Q. And how long did you operate that business?

A. I believe October 12 they revoked it.

Q. Now, do you know Mr. Harold Thornton who has filed a letter in this case?



(Testimony of Anthony Bordenelli.)

A. Not too personal. I know of him. He lives across the street from me.

Q. What kind of business does he have across the street?      A. A garage and restaurant.

Q. A garage and restaurant?      A. Yes.

Q. What sort of business do you have?

A. A restaurant and bar, I did have.

Q. Do you know for a fact whether Mr. Thornton lives in Kenai or not now?      A. Yes, I do.

Q. Is he living in Kenai?

A. No, I believe he has leased all his belongings to some party.

Q. Do you know approximately how long it has been since he was living in Kenai?

A. Well, I believe he came up here for the protest last time.

Q. But was he living there at that time?

A. He was living there at that time, but—let's see how was [13] that—I believe when Judge Diamond that he would be—sign a new petition without prejudice, I believe he came back up here. I believe he was gone then, but he made another trip back.

Q. In other words, he was not living in Kenai at the time you obtained your license?

A. No, he wasn't. Just as soon as I opened up and run awhile then he came back.

Q. For a visit or to live?

A. I was told he came back to close the bar.

Q. When you opened up your place of business under the liquor license did you have quite a large investment in that business?

(Testimony of Anthony Bordenelli.)

A. Yes, I did. I had all I could borrow to fix it up.

Q. Do you still have a large inventory of liquor on hand that you were forced to keep?

A. I do.

The Court: Counsel, that is irrelevant and immaterial. The only question we are concerned about is whether or not he complies with the law.

Mr. Wilson: Your Honor, I feel that no further questions are necessary in that he has shown that he has done everything necessary in the matter to obtain the license if he is qualified under the new statute and if, in fact, he had a valid license during the time he was in operation and I have no [14] further questions. If you have any——

The Court: The Court has one question. Mr. Bordenelli, I believe you testified that your place was farther than any other place from the church and school, is that correct?

A. Excepting one, the Last Frontier. I had forgotten it, but otherwise, I believe my place is farther than any place there in question now.

The Court: From the church?

A. From the church their place is just a little over 200 feet from there, but I believe my place is farther, excepting the Last Frontier.

The Court: How about the school—are any of these other places near the school?

A. They are all nearer than I am—any one you take. You see, the way it is laid out I am farther away from the church and school than anybody that

(Testimony of Anthony Bordenelli.)

is in there already. I am farther away than they are because you could take a ruler and map and never get no place—1350 feet, nowhere within that radius from any church or school.

The Court: And the rest of them, of course, have license?

A. They did have licenses before this new law came in and they are——

The Court: And they are complying with the '49 Act which provides if they were less than a quarter of a mile, but had a valid license during the year 1949 on through that they can [15] be issued another license?

A. Yes.

Mr. Wilson: I will ask one more question, if I may. Is there a bar directly, almost opposite your business?

A. Yes, there is.

Mr. Wilson: And have they obtained a new license for 1954?

A. They have—just about 20 feet from this fellow that is protesting mine. Your Honor, I believe—I don't know if this is necessary, but I believe the only reason he is protesting is because our restaurant has practically closed his restaurant and I think if he could freeze the bar out and thought maybe he could freeze the restaurant out because his restaurant has changed hands two or three times. That is the only objection I know of.

The Court: He said, "The Bordenelli business

(Testimony of Anthony Bordenelli.)

is immediately across the street from my garage and apartment."

A. Their bar is just 20 feet from his window, the other one, and he has never protested it. It is just, your Honor, as far as I know, that is my belief, on account of the restaurant more or less.

The Court: He has a restaurant there, does he?

A. Yes, and it has changed hands two or three times since our restaurant has been there.

Mr. Wilson: Your Honor, for the record he has filed an [16] affidavit stating that he has not been guilty of a conviction.

The Court: The Court has read that.

Mr. Wilson: But, I would like to ask it for the record. Have you or your wife been guilty or convicted of any violation or infraction of the Territorial Liquor Laws?

A. No, we haven't or any other thing.

The Court: Is there just you and your wife on this license?

A. Yes.

The Court: Formerly you had a partner?

A. We had Mike Sosiko, then he made different arrangements.

The Court: Well, that is all. You may step down. Do you have anything further to present?

Mr. Wilson: Your Honor, I would prefer to pursue my argument under the '53 statute having a right to reissue of the license because his authorization under the law—now, your Honor, if your

Honor prefers I would submit a brief in that regard——

The Court: I would prefer that you submit a brief as to that you have complied with the law and the Court told you in advance what the problem was and I think that you have the burden of proof to prove that you have complied with the law.

Mr. Wilson: I would like to read to the Court——

The Court: Don't you think it would be a waste of time. Wouldn't it be better to submit it in the form of a brief?

Mr. Wilson: Since I am going to submit a brief I think [17] it would.

The Court: Are there any protestants in the courtroom today protesting the issuance of a license to Tony and Eyvohn Bordenelli? Hearing none then the Court will continue this until the submission of briefs by counsel. [18]

### Proceedings

The Court: The next matter to come before the Court, I believe we have the Kelly License, however, I would think it would be proper at this time to bring up the case of Bordenelli for the reason that these protestants are here from Kenai and it would be more opportune for them and for the Court to go right into this next application. So at this time unless there is objection thereto the Liquor License No. 4004 will be brought up for determination. Very well, now in this case a license was issued, a hearing was had sometime in January



of this year, as I recall, and at that time the Court did issue a license. Now, as I recall and I haven't looked at the file for several months, but as I recall there was a license application made before The Honorable Anthony J. Dimond. If my memory serves me correct that license was denied subsequent thereto and after the first day of July, 1953—I may be in error on that last statement—a license was issued by Mr. Cooper, who, at that time was judge from Nome. Subsequent to that time Judge Folta came along and revoked that license so there was no license in existence for the balance of the year 1953. Then as I pointed out to you this case was set down for hearing in January of this year, as I recall, and the hearing was had at that time. The principal determination of the Court was the question of location of the school in relation to this establishment. The question of a renewal of a license was not considered by this Court although the Court should have done [20] so at that time and this case now comes up before the Court as to whether or not this license was properly issued under the law in January of this year. At this time let the record show that Mr. Kirkland appears for and on behalf of the Government at the request of the Court and let the record also show that Mr. Stanton T. Wilson appears for and on behalf of the applicants and there are a number of people in the audience who want to be heard in respect thereto. I would think that possibly the better procedure would be to have the witnesses take the stand at this time in protest thereto for the reason that the license has been

issued and that way then put the matter at issue before the Court.

Mr. Kirkland: I feel as though, your Honor, that it is more of a question of law at this particular time—if this license was validly issued by the Court due to the——

The Court: I agree with you in that respect, however, I would like to hear the protestants as to what they have to say in respect thereto. So will you please call the protestants and thereafter the Court will hear counsel as to argument and also hear the licensee if he wants to be heard.

Mr. Wilson: If it please the Court, this is an order to show cause.

The Court: Why it should not be revoked.

Mr. Wilson: And is not a hearing.

The Court: That is correct.

Mr. Wilson: We oppose any protests in this case because [21] it is not a hearing and because it has been determined. Now, there has been complaints served on Mr. and Mrs. Bordenelli, who are present today, stating that they are too close to the church and school and I feel that the Court should not allow any protestants to testify in this case because Mr. and Mrs. Bordenelli are operating under a license at this time. They have been granted it. They had a previous hearing with opportunity for the protestants to be heard and this hearing is a matter, strictly an order to show cause why they should have the license revoked and that being the case we have admitted that we are within a certain distance from the school or church and that issue having

been resolved under a previous hearing. It is purely a matter of law on which the Court should decide and that any testimony as to protesting the license would be irrelevant at this time.

The Court: I am inclined to agree that you are right and the Court was wrong, now that you have refreshed my recollection. This is up on order to show cause and that being the case I think you will agree with that, wouldn't you, Mr. Kirkland?

Mr. Kirkland: Yes, your Honor.

The Court: I overlooked that point and I am in error. You may proceed. Now, I believe, that being the case, the order to show cause, the Government is the moving party so may I hear you first, Mr. Kirkland.

Mr. Kirkland: Your Honor, I don't have the——

The Court: Just a moment, please. I hope that the [22] witnesses in the audience understand the Court's position. I feel that counsel is right—Mr. Wilson is right and I am in error because this comes up on an order to show cause, as I pointed out, and I tell you that just to explain my position so you don't think I am precluding you from testifying in respect thereto. Very well, Mr. Kirkland, I am sorry to interrupt you.

Mr. Kirkland: I believe the exact date His Honor has already stated—I don't have the file before me and I don't know the exact date that Judge Folta denied the—issued an order revoking the license. I do know that the file reflects a minute order by Judge Folta denying permission to reopen their application. So on behalf of the Government we

contend that what was the license then became dead, and a license can only exist as long as the Government grants it. Under the statute a license shall be issued for no greater period than one year. When this license was revoked there was nothing there and there was a minute order of the Court refusing to allow the applicants to reopen the matter. There is nothing at this time. Once it is dead it comes under the existing law and then being too close to the school, which is going into the previous argument—meaning the word “renewal” and I don’t feel it is necessary to say any more on that point.

The Court: Do you have a copy of counsel’s brief in this case?

Mr. Kirkland: No, sir, I don’t have a copy of counsel’s [23] brief. I don’t have anything.

The Court: Well, there was a brief filed in December of 1953, the history of the matter. The brief of counsel reflects that on the 21st day of July, 1953, Judge Cooper signed a license for the applicants, said it operated there a liquor establishment until the 12th day of October, at which time Judge Folta revoked said license. I think that gives you the time, counsel. Very well, then, Mr. Wilson, what have you to say in response thereto?

Mr. Wilson: If it please the Court, this case will be—I don’t know which case will decide or whether you will decide all these cases at the same time, but it hinges a great deal on the decision that you will render in the Kelly cases from Naknek.

The Court: That is right, it is the same question exactly.



Mr. Wilson: First, the Kelly cases preceded this case and I relied on the same basis of law for my argument previous to this time and with the light on that particular case——

The Court: Now, in that case, I point out to you, the facts are a little different in the Kelly case. As I recall there was a ruling last fall by the Court, the first afternoon this Court was on the bench and the Court didn't have a good opportunity to go into it too well, however, the license was not reissued during the month of December. The licenses were coming over this Court's desk at the rate of between 25 and 50 a day and it is a physical impossibility for this Court to go in and determine [24] whether or not the applicants were entitled to a license. The Court relied entirely upon the Clerk of the Court, who was Mr. M. E. S. Brunelle. Mr. Brunelle passed the license. The Court didn't even read it, didn't have time to read it as to the facts, but the facts in this case are a little different.

Mr. Wilson: My purpose in bringing that to your attention was that you have continued that case giving Mr. Hughes time to look into the transcript and to show that he had brought the proper facts to the attention of the Court.

The Court: Hear me out, please. In that respect it is a little different here, however, it does effect you in part. There is a possibility of it being in contempt of court for one counsel to bring up the same application before another court when that once has been determined.

Mr. Wilson: For that reason I wonder if the



court wishes to continue this matter to be argued at the same time Mr. Hughes——

The Court: No, I do not. I would like to have it heard.

Mr. Wilson: In that case I would like to correct one statement you made and that is that this was not heard in January, 1954, but was heard in December, 1953.

The Court: Very well.

Mr. Wilson: I believe the license was granted on December 31, 1953. Now, we are not necessarily relying on anything that happened in the Kelly case and I wish to point out to [25] the court if he wishes to refer to the record, transcript, that I brought to the court's attention that this case was very involved, having involved at least Judge Dimond, Judge Cooper and Judge Folta, and yourself, and several attorneys, and that ordinarily these licenses are okayed by the Clerk's office and sent in for your signature and where they are okayed by the Clerk—they are more or less routine—and you don't view the matter. I brought that to the attention of the Clerk's office and requested that we have a hearing in the court. I put the applicant, Mr. Tony Bordenelli, on the stand. I showed that he had properly done everything necessary in his application for a second license under the same establishment in the same location. That being the case, it is our contention—and I also brought to the court's attention the fact of all these previous signature orders and revocations and what we had done and presented it to the

court. It was shown, and the matter, I feel, was properly decided upon that Mr. and Mrs. Bordenelli had a license existing during part of the year 1953, and then revoked that license and extinguished the rights thereof until the end of December 31, 1953.

Now, we submit, your Honor, we had the right to file for a second license and we did so in a brief that was filed supporting that contention. We did so under the new statute which permitted anyone authorized by law to sell intoxicating liquors subsequent to March 23, 1949, in a building that was authorized by law, would have the opportunity to apply for a reissue, calling it [26] what you will, another license, a reissue or renewal, but that gives the right under this exception for the applicants to reinstate themselves under this new law. Although, had they not been doing business prior to that time, subsequent to 1949, had they not been doing that business, they would be deprived of getting a license because the distance allowed a place of business to be located near a church or school was changed from 200 feet, I believe, previous, to a distance of one-quarter of a mile. Now, that exception of the rule brought these applicants within that exception. That matter was brought to the attention of the court and he felt—at that time I wanted the matter settled once and for all. We had gone through this matter several times at the expense of the applicants, I might add, a great expense, and I felt in doing so, that they had a right to do that—once and for all. I call attention to the court that the present court reporter was the reporter at that time, and if

the court is inclined to hear the testimony given by Mr. Bordenelli, I believe it will bear out any contention herein and to support my argument. The law was argued before the court at that time.

The Court: I have no reason to doubt you, counsel. As a matter of fact——

Mr. Wilson: I feel——

The Court: Hear me out. I said I have no reason to doubt you, but the court could have made an error in his ruling at that time. [27]

Mr. Wilson: I feel, your Honor, that the matter set forth in the complaint here, stating the distance of the church and school involved, that we have sufficiently shown that they are within the exception of the law as provided under the Statute of 1953.

The Court: Chapter 116.

Mr. Wilson: Chapter 116, and I am sure your Honor is thoroughly familiar with that, and I won't labor on that, but I do say that once your Honor has passed upon that, that that matter is in the nature of—or absolutely *res judicata* on that issue.

The Court: I don't share that viewpoint, counselor. Have you any authority on that point?

Mr. Wilson: I support that contention by——

The Court: I think the court has the same right to correct his mistakes as anybody else.

Mr. Wilson: I am merely trying to support my argument and if I am proven wrong—I first shall argue that the court has no right to go back into that. Then I, secondly, contend if he does that he

will find that the law sufficiently supports our contention that these applicants are within the exception as set out in that statute. Now, if I may make a point here. Had the Legislature the intention of not protecting those people who have invested money in locations for the purpose of selling liquor, had they not had that intention in mind, why would they not have made that statute apply to those licenses which are already in [28] existence and existing at the time. I would like to point out to your Honor that there are statutes—not in this particular case, now the statute does not say when a person ceases to have an opportunity to renew an application that has expired—but, there are statutes which say that an application cannot be renewed after such and such a date. If that were the case, I would not present such an argument, but in our particular case there is nothing said about that and the only thing we can construe is that the person is allowed to make another application for a license if he were doing business subsequent to March 23, 1949. It would have been just as easy for the Legislature to have said, “those doing business at the time of the enactment of this act,” but it did not say that, and in all good conscience, we cannot allow the statute to upset people who have invested money and who have qualified in every other respect, we cannot arbitrarily deny them the right to do business.

Now, if I may read from 48 C.J.S, Section 157, Intoxicating Liquors, where it states, “It has been held that, if the hearing is before a court, its judgment conclusively determines all points which it is



required to consider, so that these matters are res judicata on an application for a renewal of the license, unless fresh issues are raised remonstrance;”. I submit, your Honor, in this case there are no fresh issues.

Now, I do not know how far the court would like to go back into this case, but I feel that if the court agrees that the [29] issue here is the distance of the church and school, I feel that the argument we have presented is sufficient without going back into the background of the matter. That this has been a case in which is usual in the liquor cases, there is much conflict and interest in the conflict of rules and regulations and procedural matters, and for that reason I feel that if the court is so inclined that I would present whatever brief or whatever is necessary on this particular issue, but I do not know the position of the District Attorney. I believe that he has conceded there is no other issue involved in this case and that being the case this must hinge on this provision in the law. It says, “Provided, however, that a license may be reissued for sale of intoxicating liquors at a time subsequent to March 23, 1949.” It says March 23, 1949, instead of saying at the time this statute was enacted. I cannot see how, construing the statute strictly and for the interest of invested interest, I cannot see how we can arrive at any other conclusion than that this license was issued regularly and that there has been no violation, and which I point out to the court, on revocation proceeding such as this, that it is usual that there



has been some violation on the part of the applicants for an order of the district court to take cognizance and revoke the existing license, otherwise, it would be possible for the court to act arbitrarily in the matter if the court was so inclined and I do not intimate that is the case.

The Court: I appreciate that. [30]

Mr. Wilson: No, the applicants herein have set forth an affidavit which controverts the complaint and justifies the court's issuance of the license. In the beginning, I do not know what matters have come before the court at the time this order was served on the applicants, but I do feel that by looking at the file, it is quite natural that the court or the clerk of the court or the District Attorney would arrive at the conclusion that this license was issued irregularly because it states on it that it is a closer distance than a quarter of a mile and not being advised and no transcript of the record being in the file, the court could not readily determine that this matter had properly been brought before the court and to the attention of the court. I would like to point out to the court that if the court is inclined to feel it is discretion of the court to change his mind, this, that this case does not hinge on any other particular case. It is a case which is not likely to arise again and the fact that the license is allowed to continue in existence in accordance with the court's order, which it was, would not in any way affect the court's making a decision in a liquor case wherein the decision is based purely on an entirely new application. Now, I call attention to the fact

in the application it says, "Is this a first application or a renewal" and it would indicate that it is the second application and not necessarily following consecutively. Now, I would like to point out to the court that in 48 C.J.S., Section 156 under Rules of Evidence, it is not pertinent [31] except to show that there can be a renewal of license following at a time which there has been a lapse of time wherein the applicants had a license and, "which has expired, or for the restoration or renewal of a license which has been revoked, must be treated as a new application, throwing the burden of proof on the applicant." Well, certainly, it may be treated, for all practical aspects, as a new application, but I submit if it is a new application that it still would come within the exception to the rule which allows the person to be within the distance of a church or school that was allowed during the year 1953.

The Court: Very well. Mr. Kirkland, have you anything to say in reply thereto?

Mr. Kirkland: Yes, your Honor. First of all, counsel has stated—under his construction of Chapter 116 of the 1953 Session Laws, he has construed in the eyes of the investment interest. I think he is highly in error. Such a statute as this should always be construed in the public interest, that is, where you have school grounds and churches within a close area. Now, I contend that upon reading the statute, that the word "reissue" means that it would have to be continuous. Now, the reason I would base it on that is that counsel has claimed that this right goes with the building, that is, that any license and any-

one could come into the same building and get a license even though maybe it is two or three years later. Under the statute——

The Court: The court wouldn't want to hear you on that [32] because the court has a firm opinion that is not true.

Mr. Kirkland: Your Honor, I was trying to bring that out to support the argument to show what the legislative intent was.

The Court: I didn't want to interrupt you, but I wanted you to be certain where the court stood in respect to that argument.

Mr. Kirkland: And under his contention that if it goes to the building——

Mr. Wilson: Your Honor, I don't believe that was my contention.

Mr. Kirkland: I may have been in error. That might have been Mr. Hughes' contention.

The Court: Well, that certainly was discussed by Mr. Hughes. I don't recall Mr. Wilson referring to that, and even if he didn't and you want to argue it, I want to let you know that as far as I am concerned the license is not issued to the building, but to the person.

Mr. Kirkland: I submit when it has been revoked by order of the court that there is no license there and it could not be renewed and that this particular section of the Statute 1953, that the legislative intent is that it is continuous rather than for a break of time, because conditions would change, economic, social and otherwise, where it would not

be desirable if he were allowed to go under such a decision as that. [33]

The Court: Very well, Mr. Wilson, the court would like to have you look into the question of renewal and the question of revocation. I point out to you in advance, there has been several other counsel who have looked into it, and just don't find any law. There have been a few cases, very, very few. I don't want you to get discouraged after you look for the first week or 10 days, but I would like to have you find anything you can to support your position.

Mr. Wilson: Your Honor, there is nothing to the contrary, either.

The Court: That is true, so this court is going to have—establish—and anything you can get to help the court in respect thereto would be appreciated. Now, frankly speaking, I feel that this situation is entirely different than that of Kelly, and I would like—if possible, could you get away for 3 days? If you can't, why, then the court intends to rule on this next Friday.

Mr. Wilson: If you want to rule next Friday, I will write a brief to you by that time.

The Court: I wish you would, because if you don't, the court will have to.

Mr. Wilson: Do I understand you are going to rely upon—do I understand the court to mean I will have to establish *res judicata*?

The Court: Beg your pardon? [34]

Mr. Wilson: Do I understand the court to mean



I will have to establish you have the right to change the order *res judicata*?

The Court: No, the court doesn't feel that has too much merit. If you want to embarrass me upon that point you may do so, but I don't believe you can find the law to support that position; however, there might be some law, but the court believes that over the common weight of the law is that the court does have a right to change positions once he has made a decision in error, and that is my position. Now, if you find some law and want to brief that point, I certainly wouldn't have any objection to it, but I want to advise you in advance the position of the court.

Mr. Wilson: Does the court disagree with the fact if this were not a renewal, were a new license, they would not have a right to apply for another license under this amendment to the Statute?

The Court: That is right.

Mr. Wilson: Then the court will, I hope, leave himself open to changing his mind subject to my brief.

The Court: Well, naturally, if the court didn't want to have your brief, I would have arrived at a decision on it. I wouldn't want to put you to that trouble and worry. I will state this, to be frank with you, that your chances of overruling the court's position at that time are very slim, because this has been argued in three other cases, so I don't want to discourage [35] you too much, but you are going to have to bring in some pretty persuasive law to convince the court that the court did not make an



error in this particular application. Very well, the court will stand in recess until the call of the gavel.

(End of Record.)

United States of America,  
Territory of Alaska—ss.

I, Iris L. Stafford, Official Reporter of the above-entitled court, hereby certify:

That the foregoing is a full, true and correct transcript of the record on appeal in the above-entitled matter taken by me in stenograph in open court at Anchorage, Alaska, on December 29, 1953, and June 25, 1954, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD.

[Endorsed]: Filed September 27, 1954. [36]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
RECORD ON APPEAL

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure and pursuant to designation of counsel, I am transmitting herewith

the original papers in my office dealing with the above-entitled action or proceeding, and including specifically the complete record and file of such action, including the bill of exceptions setting forth all the testimony taken at the trial of the cause, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the order of revocation of LB&W License No. 5884, filed and entered in the above-entitled cause by the above-entitled court on July 27, 1954, to the United States Court of Appeals at San Francisco, California.

WM. A. HILTON,  
Clerk of the District Court for the Territory of  
Alaska, Third Division.

[Seal] By /s/ CARETA BRYANT,  
Chief Deputy Clerk.

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[Endorsed]: No. 14534. United States Court of Appeals for the Ninth Circuit. Tony Bordenelli and Eyvohn Bordenelli, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: October 4, 1954.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14534

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TONY BORDENELLI and EYVOHN BORDE-  
NELLI,

Defendants.

APPELLANTS' STATEMENT OF POINTS

1. The Court erred in finding that the question of renewal of a liquor license had not been considered in granting of the license on the 30th day of December, 1952.

2. The Court erred in holding that the license issued on the 21st day of July, 1953, was not subject to reissue and renewal.

3. The Court erred in reversing its order which was res judicata.

Dated this 16th day of March, 1955.

WILSON & WILSON,

By /s/ T. STANTON WILSON,

Of Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 18, 1955.